

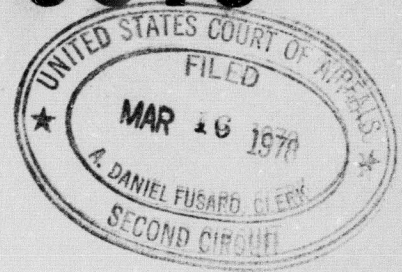
***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S REPLY
BRIEF**

77-5019

3/20
IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



In the Matter of
STIRLING HOMEX CORPORATION,
Debtor,
GREGORY JEZARIAN, et al.,
Appellants.

Appeal from the United States District Court
for the Western District of New York

REPLY BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,
APPELLEE, IN SUPPORT OF REVERSAL OF JUDGMENT BELOW

DAVID FERBER
Solicitor to the Commission

IRVING H. PICARD
Assistant General Counsel

Securities and Exchange Commission
Washington, D.C. 20549

MARVIN E. JACOB
Associate Administrator

New York Regional Office
Securities and Exchange Commission
26 Federal Plaza
New York, New York 10007



TABLE OF CITATIONS

<u>Cases:</u>	<u>Page</u>
Bankers Life and Casualty Co. v. Kirtley, 338 F.2d 1006 (C.A. 8, 1964).....	2
Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972).....	3
Cartridge Television, Inc., In re, 535 F.2d 1388 (C.A. 2, 1976).....	2
Central States Electric Corp. v. Austrian, 183 F.2d 879 (C.A. 4, 1950), <u>certiorari denied</u> , 340 U.S. 917 (1951).....	2
Country Life Apartments, Inc. v. Buckley, 145 F.2d 935 (C.A. 2, 1944).....	2
Frank v. Drinc-O-Matic, Inc., 136 F.2d 906 (C.A. 2, 1943).....	1
Lorraine Castle Apartments Bldg. Corp., In re, 149 F.2d 55 (C.A. 7), <u>certiorari denied</u> , 326 U.S. 728 (1945).....	2,3
Patent Cereals v. Flynn, 149 F.2d 711 (C.A. 2, 1945).....	2
Porto Rican American Tobacco Co., In re, 112 F.2d 655 (C.A. 2, 1940).....	2
Securities and Exchange Commission v. American Trailer Rentals Co., 379 U.S. 594 (1965).....	3
United States v. Stirling, et al., C.A. 2, No. 77-1140 (decided Feb. 2, 1978).....	4
V. Loewer's Gambrinus Brewery Co., In re, 141 F.2d 747 (C.A. 2, 1944).....	2

Page

Statutes and Rules:

Bankruptcy Act, 11 U.S.C. 1-112.....	1
Chapters I-VII, 11 U.S.C. 1-112.....	1,3
Section 63, 11 U.S.C. 103.....	3
Section 63d, 11 U.S.C. 103d.....	3
Chapter X, 11 U.S.C. 501-676.....	1,3
Section 116(3), 11 U.S.C. 516(3).....	2
Section 208, 11 U.S.C. 608.....	1
Section 216(10), 11 U.S.C. 616(10).....	2
Section 236, 11 U.S.C. 636.....	3
Rules under Chapter X:	
Rule 10-308(a).....	3

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-5019 and 77-5022 (consolidated)

In the Matter of
STIRLING HOMEX CORPORATION,
Debtor,
GREGORY JEZARIAN, et al.,
Appellants.

Appeal from the United States District Court
for the Western District of New York

REPLY BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,
APPELLEE, 1/ IN SUPPORT OF REVERSAL OF JUDGMENT BELOW

Chemical Bank and First National Bank of Chicago (Br. 16-21) and Chase Manhattan Bank (Br. 12-14) argue that, since substantially all of the assets of Stirling Homex Corporation, the debtor in this Chapter X reorganization proceeding (11 U.S.C. 501-676), have been reduced to cash, the court below properly applied the law applicable to liquidations in ordinary bankruptcy proceedings (Chapters I-VII of the Bankruptcy Act, 11 U.S.C. 1-112).

1/ The Commission previously has filed an initial brief in support of reversal of the order of the district court. Although the Commission is a statutory party in the reorganization proceeding in the court below pursuant to Section 208 of Chapter X of the Bankruptcy Act, 11 U.S.C. 608, it is precluded by that section from appealing and therefore is nominally an appellee on appeals brought by others. See Commission's initial Brief, p. 1 n.1.

But here the creditors have benefitted from an orderly liquidation of the debtor's assets in Chapter X, as distinguished from a forced sale of assets generally occurring in ordinary bankruptcy, and there appears to be no reason why general equitable principles normally applicable to claims in Chapter X should yield to limitations required by the expeditious nature of ordinary bankruptcy.

Appellees cite no Chapter X cases in support of their proposition, and we have found none. 2/ Indeed, a similar argument was rejected in Bankers Life and Casualty Co. v. Kirtley, 338 F.2d 1006, 1009-1010 (C.A. 8, 1964), where the Chapter X debtor was liquidated pursuant to Section 216(10), 11 U.S.C. 616(10). 3/ Moreover, this Court held in Patent Cereals v. Flynn, 149 F.2d 711, 713 (1945):

"[T]here is nothing in Section 216 which precludes approval of a plan of reorganization after a sale of all or a substantial part of a debtor's property in the course of administration under a Chapter X proceeding. Subsection (10) * * * does not forbid a plan where the sale has occurred before the plan is submitted for approval * * *." 4/

2/ They rely (Chemical Bank and First National Br. 20-21) and Chase (Br. 13) primarily on this Court's decision in In re Cartridge Television, Inc., 535 F.2d 1388 (1976), an ordinary bankruptcy case, which we distinguished in our initial brief (p. 12 n. 13).

3/ As we noted in our initial brief (p. 14 n. 20), the court below recognized that a liquidation plan may be presented in Chapter X. See in this connection, e.g., Country Life Apartments, Inc. v. Buckley, 145 F.2d 935, 938 (C.A. 2, 1944); In re Porto Rican American Tobacco Co., 112 F.2d 655, 657 (C.A. 2, 1940); Central States Electric Corp. v. Austrian, 183 F.2d 879, 883 (C.A. 4, 1950), certiorari denied, 340 U.S. 979 (1951); In re Lorraine Castle Apartments Bldg. Corp., 149 F.2d 55, 58-59 (C.A. 7), certiorari denied, 326 U.S. 728 (1945).

4/ This Court has held that a debtor's assets may be sold during a Chapter X proceeding pursuant to Section 116(3), 11 U.S.C. 516(3), and that such sales need not be "in aid of a reorganization [n]or * * * await a liquidation in straight bankruptcy." In re V. Loewer's Gambrinus Brewery Co., 141 F.2d 747, 749 (1944); and see Frank v. Drinc-O-Matic, Inc., 136 F.2d 906 (1943).

There has not been in this case, as appellees concede (Chemical and First National Br. 16), the entry of an order pursuant to Section 236 of Chapter X, 11 U.S.C. 636, "adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with * * *." See also Chapter X Rule 10-308(a). And, there is "[n]othing in this section [or in the rule] which prohibits action in accord with Section 216(10)." In re Lorraine Castle Apartments Bldg. Corp., 149 F.2d 55, 59 (C.A. 7, 1945).

Chapter X provides protection of the rights of all creditors and investors in a financially distressed company. See Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416, 422 (1972), citing Securities and Exchange Commission v. American Trailer Rentals Co., 379 U.S. 594, 604 (1965). By contrast, the provisions of Chapters I-VII only provide for the protection of a limited class of creditors, those with provable claims under Section 63 of the Bankruptcy Act, 11 U.S.C. 103. Unliquidated and contingent claims, such as those based on alleged violations of the federal securities laws, which have not been reduced to judgment are not provable under Section 63(d), 11 U.S.C. 103d. But, as we noted in our initial brief (pp. 10 and 12 n. 13), Chapter X includes a more expansive definition of claims — a definition that specifically includes contingent and unliquidated claims against a debtor based upon alleged securities fraud. Accordingly, such claims are provable in Chapter X but not in straight bankruptcy, a significant distinction in the context of this case. Under these circumstances, it would be detrimental to the interest of investors and contrary to the purpose of Chapter X to permit a shift from Chapter X to the principles of straight bankruptcy at this late date. 5/

5/ As we suggested in our initial brief (pp. 4-5 and nn. 4-5, pp. 11-12), in view of the information available to the court, it would appear

CONCLUSION

For the foregoing reasons and the reasons set forth in our opening brief, the order under review should be reversed and the case should be remanded with instructions that the classification of defrauded stockholders should be decided on the equities presented by this case.

Respectfully submitted,

DAVID FERBER
Solicitor to the Commission

MARVIN E. JACOB
Associate Administrator

New York Regional Office
Securities and Exchange
Commission
26 Federal Plaza
New York, New York 10007

IRVING H. PICARD
Assistant General Counsel

Securities and Exchange Commission
Washington, D. C. 20549

March, 1978

5/ (footnote continued)

that the allegedly defrauded stockholders of Stirling Homex would be able to prove their claims without undue delay. Since the date of that brief, this Court has affirmed the conviction of certain officers and directors of Stirling Homex based, among other things, on false and misleading financial statements and reports issued by the debtor, one of the bases for the stockholders' claims. United States v. Stirling, et al., No. 77-1140 (decided Feb. 2, 1978).



